UNITED STATES OF AMERICA v. OMAR AHMED KHADR	**Defense Motion To Dismiss** (Lack of Judicial Independence) 11 July 2008

1. **Timeliness:** This motion is filed within the timeframe established by R.M.C. 905 and the Military Judge's 19 June 2008 scheduling order.

2. **Relief requested:** The defense respectfully requests the Military Judge to dismiss all charges and specifications because this Military Commission in unlawfully constituted and lacks jurisdiction to hear this case.

3. **Burdens of proof and persuasion:** As the moving party, the defense bears the burden of establishing any factual issues necessary to resolve the motion by a preponderance of the evidence. R.M.C. 905(c)(2)(A).

4. **Facts:**

a. On October 17, 2006, the President signed into law the Military Commissions Act of 2006, P.L. 109-366 (MCA). MCA § 948j provides that "[a] military judge shall be detailed to each military commission under this chapter. The Secretary of Defense shall prescribe regulations providing for the manner in which military judges are so detailed to military commissions."

b. In January 2007, the Department of Defense issued the Manual for Military Commissions (MMC). The MMC gives military judges powers similar to those exercised by military judges in trials by court-martial under the Uniform Code of Military Justice (UCMJ). *See, e.g.*, R.M.C. 801 (stating military judge shall "preside" over military commissions, rule on "all questions of law" and "instruct the members on questions of law and procedure that may arise"). The MMC gives military judges additional powers, unique to military commissions, including expansive powers to review classified matters *in camera* and *ex parte* and rule on the admissibility of evidence outside the presence of the accused and his counsel. *See* Mil.Comm.R.Evid. 505.

c. The MMC provides that military judges, including the "Chief Trial Judge" shall be selected from a pool of judges nominated by the Judge Advocates General (JAGs) of each of the military departments. *See* R.M.C. 503(b). The MMC does not otherwise provide for supervision of military judges by the service JAGs. Military judges for each military commission may be detailed or changed by the Chief Trial Judge. *See* R.M.C. 505.

d. In April 2007, the Department of Defense issued the Regulation for Trial by Military Commission (Regulation). The Regulation provides that the Chief Trial Judge of the

Military Commissions Trial Judiciary (MCTJ) shall be selected by the Convening Authority for Military Commissions (Convening Authority). *See* Regulation, Chap. 6-1.

e. On 1 March 2007, the Convening Authority appointed COL Ralph H. Kohlmann, USMC, as Chief Trial Judge. (*See* AE 003.)

f. On 24 April 2007, charges against the accused, Mr. Omar A. Khadr (Mr. Khadr), were referred to this Military Commission. (*See* AE 001.)

g. On 24 April 2007, COL Kohlmann detailed COL Peter E. Brownback III, JA, USA, as military judge in this Military Commission. (*See* AE 004.)

h. On 29 May 2008, COL Kohlmann "changed" the military judge in this Military Commission, detailing COL Patrick Parrish, JA, USA, as military judge, effectively relieving COL Brownback of further duties in connection with the case.[1] (*See* LTC Sowder e-mail of 29 May 2008 (Attachment A).)

5. **Law and argument:**

a. **The procedures governing the appointment of the Chief Trial Judge and Military Judge in this Military Commission contravene Mr. Khadr's right to be tried by a fair and impartial tribunal.**

(1) "Congress, of course, is subject to the requirements of the Due Process Clause when legislating in the area of military affairs, and that Clause provides some measure of protection to defendants in military proceedings." *Weiss v. United States*, 510 U.S. 163, 176 (U.S. 1994) (citing *Rostker* v. *Goldberg*, 453 U.S. 57 (1981); *Middendorf* v. *Henry*, 425 U.S. 25 (1976)). The notion that basic constitutional safeguards, including, necessarily, the right to "due process of law," do not apply to these proceedings because Mr. Khadr is detained at the Guantanamo Bay Naval Station has been decisively rejected by the U.S. Supreme Court. *See Boumediene v. Bush*, 128 S.Ct. 2229, 2253 (2008) (Like Puerto Rico, Guam and the other territories that have remained under the "complete jurisdiction and control" of the federal government since the conclusion of the Spanish American war, the federal government retains "de facto sovereignty over this territory."); *id.* at 2259 ("Even when the United States acts outside its borders, its powers are not 'absolute and unlimited' but are subject 'to such restrictions as are expressed in the Constitution.'") (citations omitted); *Balzac v. Porto Rico*, 258 U.S. 298, 312-13 (1922) ("the guaranties of certain fundamental personal rights declared in the Constitution, as, for instance, that no person could be deprived of life, liberty, or property without due process of law, had from the beginning full application" in the unincorporated territories).

[1] The defense anticipates filing a separate motion to dismiss based on unlawful influence in violation of MCA § 949b based on these events in this particular case. The instant motion, however, is directed to the structural lack of independence inherent in the Chief Trial Judge's selection by the Convening Authority and authority to detail and/or change military judges in all military commission cases under the MCA.

(2) "It is elementary that a fair trial in a fair tribunal is a basic requirement of due process." *Weiss*, 510 U.S. at 178 (internal quotation omitted). And it goes without saying that "[a] necessary component of a fair trial is an impartial judge." *Id.* (citations omitted). In *Tumey v. Ohio*, 273 U.S. 510 (1927), the Supreme Court held that trial of a criminal defendant before a judge with a personal interest in the outcome of the case constituted a denial of due process of law. *Id.* at 532. *Tumey* involved an Ohio statutory scheme, which allowed village mayors to try certain minor crimes and sentence defendants to fines that would be directed into village coughers. Striking down the process as a deprivation of due process, the Court reasoned that "[e]very procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law." *Id.*

(3) Considerations similar to those at issue in *Tumey* require invalidation of the Regulation's procedure for detailing and changing military judges as a deprivation of due process. While the Military Judge in this Military Commission does not necessarily possess the same direct interest in the outcome of this case as the mayor in *Tumey*, the Military Judge is detailed and supervised by a Chief Trial Judge who his hand-picked by the Convening Authority. As the official responsible for which cases will or will not be referred for trial by military commission, *see* R.M.C. 601, the Convening Authority is the official vested with prosecutorial discretion in the military commission system. Moreover, unlike convening authorities in courts-martial, the Convening Authority is, herself, hand-picked by the Secretary of Defense to do nothing other than preside over the military commission process (i.e., she is not a military commander with a military mission, to which the exercise of military justice responsibilities is incidental). The Convening Authority is therefore much more like a *de facto* chief prosecutor with a direct, institutional and personal interest in the validation of the military commission process and in the outcomes of military commission cases – a conclusion bolstered by evidence of the actions of the Convening Authority's Legal Advisor in recent months.[2]

(4) As noted above, the Chief Trial Judge, hand-picked by the Convening Authority, and, presumably, subject to termination by the Convening Authority, is in turn vested with the responsibility for detailing and effectively "undetaling" military judges in military commission cases. The Regulation thus spawns a system in which the Convening Authority could select a Chief Trial Judge favorably disposed to government positions on legal or procedural issues, or in which the Chief Trial Judge could be influenced by his dependency on the Convening Authority to advance the government's interests in certain matters. A reasonable outside observer might view this as the explanation for such things as COL Kohlmann's decision to proceed in the case of *United States v. Hicks* in March 2007 before the regulatory framework for the military commission process had even been established (resulting in two of Mr. Hicks' three lawyers being ejected from the case),[3] or his decision to defend the military commissions against public criticism following COL Brownback's termination by effectively issuing a press

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[2] *See* matters submitted in support of anticipated defense motion to dismiss based on unlawful influence, which will be filed with the Military Commission no later than 15 July 2008.

[3] *Terror suspect pleads guilty; Australian David Hicks' admission caps a day of legal wrangling at the Guantanamo tribunal*, Los Angeles Times, 27 March 2007 (Attachment E).

release and then refusing to answer further questions about the circumstances of COL Brownback's departure.[4] And that the power to "change" military judges could be used as a tool for controlling their actions (and could be perceived by other military judges as such) was palpably demonstrated by COL Brownback's sudden (and apparently involuntary) removal from this case.

(5) The problem is compounded by the novel legal and procedural issues on which military judges in the military commission process are required to rule. Military judges are seemingly confronted in each case, as in this one, with a number of so-called "law motions" relating to the extraordinarily controversial issues raised by the legal underpinnings of the military commission process. Resolution of one or more of those issues (e.g., whether engaging in combat without meeting the criteria for Prisoner of War status is itself a "war crime") against the government in any case could have the practical effect of "derailing" the entire military commission process. Moreover, the cases take place in a highly-charged political environment in which there is apparently a great urgency on the part of the government to produce convictions as rapidly as possible. As these issues are resolved in a *pre-trial* setting, the protection afforded by R.M.C. 505(e)'s requirement to show "good cause" for a change of military judge *after* assembly of the members is of limited to no value in preserving the fairness (and perceived fairness) of the process.

(6) *Weiss*, mentioned above, does not compel a contrary result. In *Weiss*, the Supreme Court rejected an attack on the system governing the appointment of military judges in trials by court-martial under the UCMJ. Noting a need to defer to Congress' judgment in matters relating to military discipline, as well as the existence of a number of structural guarantors of judicial independence present in court-martial practice (but not present here), the Court held that the absence of a "fixed term" of office for military judges did not constitute a deprivation of due process for court-martial accused. *Weiss*, 510 U.S. at 181.

(i) Here, however, in contrast to *Weiss*, there is no Congressional judgment to which the Commission need defer. The system created by the Regulation, in which the Chief Judge is selected by the Convening Authority, is not the product of a Congressional choice, but of regulatory fiat. There is absolutely no reason to believe the Congress contemplated, let alone intended to condone, such a procedure when it authorized the Secretary to prescribe regulations for trial by military commission subject to the general requirement that the Secretary deviate from court-martial practice only when it would not be "practicable or consistent with military or intelligence activities[.]" *See* MCA § 949a. Military judges in courts-martial are, of course, selected and supervised not by convening authorities, but instead by the service JAGs. *See* 10 U.S.C. § 826 (Article 26).[5] Other than a desire to secure an advantage for

[4] *See* LTC Sowder e-mails of 2 June 2008 (Attachment B) and 1 July 2008 (Attachment C). The defense notes that COL Kohlmann's "comment" on COL Brownback's removal was sent to Pentagon Public Affairs personnel and distributed to the press within a matter of hours. *See Marine colonel defends dismissal of war court judge*, Miami Herald, 2 June 2008 (Attachment D).

[5] Article 26(c) provides, in pertinent part, that "[a] commissioned officer who is certified to be qualified for duty as a military judge of a general court-martial may perform such duties only when he is assigned and directly responsible to the Judge Advocate General, or his designee, of the armed force of which the military judge is a member and may perform duties of a judicial or nonjudicial

the government in litigation, there is no military (or other) necessity that would justify departure from such a practice in military commissions.[6]

(ii) Moreover, the structural protections built into the UCMJ, and relied upon by the Court in *Weiss*, are largely (if not entirely) absent here. As noted above, military commission judges are not supervised in the performance of their duties by the service JAGs. Moreover, while Congress expanded the concept of "unlawful command influence" to encompass acts performed by persons not subject to court-martial jurisdiction (i.e., civilians) in MCA § 949b, there is no provision under the MCA similar to 10 U.S.C. § 898, which would make such activity an offense punishable by court-martial or otherwise and thus provide a strong disincentive to political appointees and other civilians from interfering in the commission process. Finally, in contrast to courts-martial, the "entire system . . . is [not] overseen by the Court of [Appeals for the Armed Forces]." *Weiss*, 510 U.S. at 181. Rather, it is "overseen" by a specially-created military appellate court (the so-called "Court of Military Commission Review") and the U.S. Court of Appeals for the District of Columbia Circuit – a court with no particular expertise in the area of military affairs, which has demonstrated anything but "vigilance in checking" the government's more extreme legal positions in connection with Guantanamo Bay litigation.

b. Conclusion.

(1) The system established by the MMC and the Regulation for the selection and appointment of military judges, including the Chief Trial Judge, fails to provide the requisite guarantees of judicial independence required for a fair trial. It therefore violates the Due Process Clause (as well as the requirements of the MCA). As a result, this Military Commission is not lawfully constituted and should therefore dismiss all charges and specifications for lack of jurisdiction.

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nature other than those relating to his primary duty as a military judge of a general court-martial when such duties are assigned to him by or with the approval of that Judge Advocate General or his designee."

[6] *Boumediene* additionally compels the conclusion that the Regulation's procedure governing the appointment of military judges contravenes the MCA itself (as well as the Due Process Clause). Implicitly rejecting the government's argument that the Constitution's "structural limitations" have no effect in these proceedings, it becomes clear that Congress' "declaration" that military commissions comply with Common Article 3 of the 1949 Geneva Conventions, *see* MCA § 948b(f), can only be read as mandating adherence to court-martial practice except where military necessity specifically compels a departure. *See* authorities cited in support of Def. Mot. to Dismiss for Failure to Comply with Common Article 3 (D021); *see also Hamdan v. Rumsfeld*, 548 U.S. 557, 779 (2006) (holding that deviation from court-martial practice "not justified by any evident practical need" contravenes Common Article 3's requirement of a "regularly constituted court"). Moreover, the doctrine of constitutional avoidance militates in favor of construing the statute in this way so as to avoid the question of whether the Regulation's procedure violates the Due Process Clause. *See Rust v. Sullivan*, 500 U.S. 173, 190 (1991) ("an Act of Congress ought not be construed to violate the Constitution if any other possible construction remains available.").

6. **Oral Argument:** The defense requests oral argument as it is entitled to pursuant to R.M.C. 905(h) ("Upon request, either party is entitled to an R.M.C. 803 session to present oral argument or have evidentiary hearing concerning the disposition of written motions."). Oral argument will allow for a thorough consideration of the issues.

7. **Witnesses and evidence:** The defense does not anticipate the need to call witnesses in connection with this motion, but reserves the right to do so should the prosecution's response raise issues requiring rebuttal testimony. The defense relies on the following as evidence in support of this motion:

Attachments A through E

Appellate Exhibits 001, 003 and 004

8. **Certificate of conference:** The defense and prosecution have conferred. The prosecution objects to the relief requested.

9. **Additional Information:** In making this motion, or any other motion, Mr. Khadr does not waive any of his objections to the jurisdiction, legitimacy, and/or authority of this Military Commission to charge him, try him, and/or adjudicate any aspect of his conduct or detention. Nor does he waive his rights to pursue any and all of his rights and remedies in and all appropriate forms.

10. **Attachments:**

A. [redacted] e-mail of 29 May 2008

B. [redacted] e-mail of 2 June 2008

C. [redacted] e-mail of 1 July 2008

D. *Marine colonel defends dismissal of war court judge*, Miami Herald, 2 June 2008

E. *Terror suspect pleads guilty; Australian David Hicks' admission caps a day of legal wrangling at the Guantanamo tribunal*, Los Angeles Times, 27 March 2007

William C. Kuebler
LCDR, JAGC, USN
Detailed Defense Counsel

Rebecca S. Snyder
Assistant Detailed Defense Counsel

From: [redacted]

Subject: Military Judge Change in US v Khadr

ALCON:

Col Kohlmann has directed that you be advised that he has detailed COL Patrick Parrish as the Military Judge in US v Khadr. See detailing email below. Please include COL Parrish in the Cc block on any future filings in this case. The email address for COL Parrish is as follows: Patrick.parrish@us.army.mil.

V/r,

LTC [redacted], USAR
Atto
Military Commissions Trial Judiciary
Department of Defense

-----Original Message-----
From: Kohlmann Col Ralph H [mailto:[redacted]
Sent P
[redacted]

LTC [redacted]

1. Colonel Patrick Parrish, USA, is hereby detailed as Military Judge in the case of U.S. v. Khadr.

2. Please advise the appropriate persons regarding this change.

V/R,

Ralph H. Kohlmann
Colonel, U.S. Marine Corps
Chief Judge, MCTJ

Attachment A

From: [redacted]

Subject: Comment Re MJ Change in US v Khadr

Col Kohlmann has directed that I forward the below email to appropriate persons.

v/r,

LTC [redacted], USAR
Atto
Military Commissions Trial Judiciary
Department of Defense

[redacted]

To: [redacted]LTC, DoD OGC
Subj[redacted]J Change in US v Khadr

LTC Sowder: Please forward this message to the appropriate persons.

On 29 May 2008, I detailed COL Patrick Parrish as the military judge in the case of United States v. Khadr. COL Peter E. Brownback III had been detailed as the military judge prior to that action.

Rule for Military Commission 505 reads as follows: "Before the military commission is assembled, the military judge may be changed by the Chief Trial Judge, without cause shown on the record." This provision of the Manual for Military Commissions is a virtual mirror of its counterpart in the Manual for Courts Marital. As in a court-martial involving a trial before members, the point of "assembly" in a military commission occurs following the seating of the members. The case of U.S. v Khadr is still in the pre-assembly stage of the proceedings. Since a change of military judge at the pre-assembly stage does not require a showing of good cause on the record, no explanatory comment accompanied the notice of the change issued with regard to U.S. v Khadr on 29 May 2008. It is worthy of

note that the simple language used in the U.S. v Khadr notice of change was the same as that used in the several change notices issued in other Military Commissions cases.

As a general rule, it is inappropriate for individual judges or the Military Commissions Trial Judiciary to join in the public debate concerning the Military Commissions. In that the change of military judge in U.S. v Khadr has generated discussion about the independence of the judiciary, however, I have determined that a short comment is in order.

Colonel Brownback retired from active duty after 30 years of commissioned service in 1999. He was initially recalled to active duty for a period of one year in conjunction with the Military Commissions in 2004. Colonel Brownback's recall orders were then extended by the Army for an additional year on three occasions. His current recall orders will expire on 29 June 2008.

In late 2007 I was aware that COL Brownback's recall orders expired on 29 June 2008. In order to facilitate Colonel Brownback's ability to preside over the case of United States v. Khadr through its conclusion, I requested that an additional extension to his orders be issued. Colonel Brownback was aware of my request and stated that he was willing to continue in the service of his country for as long as deemed appropriate by the cognizant authorities. The Army ultimately decided against issuing an additional extension to COL Brownback's recall orders.

The decision not to extend Colonel Brownback's recall orders for a fifth year was made by the Army in February 2008. It is my understanding that this decision was based on a number of manpower management considerations unrelated to the Military Commissions process.

In light of that decision, it became apparent to Colonel Brownback and myself that the litigation in U.S. v Khadr might extend beyond Colonel Brownback's period of recalled active service. Accordingly, we had a full discussion regarding the most appropriate time for him to hand the case off to another judge if and when it became clear that the matter would not be resolved before 29 June 2008. We ultimately determined that the best time to make the change would be after completion of what are referred to as the "law motions," but before litigation of what are referred to as the "evidentiary motions." That point was reached in late May 2008 after Colonel Brownback had issued his ruling on the last of the pending law motions, and the trial start date had been continued such that the trial would not be completed before 29 June 2008.

The change of military judge in US v. Khadr was made by me solely because COL Brownback would not be on active duty to try the case to completion. My detailing of another judge was completely unrelated to any actions that Colonel Brownback has taken in this or any other case. Any suggestion that my detailing of another military judge was driven by or prompted by any decisions or rulings made by Colonel Brownback is incorrect. Any suggestion that COL Brownback asked to return to retired status before the case of US v. Khadr was completed is also incorrect.

V/R,

Ralph H. Kohlmann
Colonel, U.S. Marine Corps
Chief Judge, MCTJ

From: [redacted]C
Sent: Tuesday, July 01, 2008 7:30 AM
To: Kuebler, William, LCDR, DoD OGC
Cc: [redacted]
Subject: RE: U.S. v. Khadr - Request for Additional Judicial Disclosures (Follow up)

Col Kohlmann will not be responding to your request.

V/r,

LTC [redacted]
Senior Attorney Advisor
Military Commissions Trial Judiciary
Department of Defense

From: Kuebler, William, LCDR, DoD OGC
Sent: Monday, June 30, 2008 11:01 AM
To: [redacted]
Subject: U.S. v. Khadr - Request for Additional Judicial Disclosures (Follow up)

Sir,

1. On 9 Jun 08, the defense in the case of U.S. v. Khadr submitted the below Request for Additional Judicial Disclosures, requesting COL Kohlmann to supplement disclosures previously made *sua sponte*. To date, the defense has not received a response to its request.

2. The defense respectfully reiterates its request for this information, or a response of some kind.

3. The defense notes that review of the "metadata" extracted from COL Brownback's 8 Jun 08 statement indicates that the document was last modified (and the PDF version created) well *after* the time reflected on COL Brownback's 8 Jun 08 e-mail to [redacted], directing that the statement be forward to the parties. This suggests that there exist (or existed) previous drafts of the document, which may have been reviewed by members of the MCTJ staff before the final document was released to the parties. For obvious reasons, information contained in any prior drafts would be germane to determining the entirety of COL Brownback's testimony concerning the circumstances surrounding his departure.

V/R

LCDR Kuebler

Attachment C

From: Kuebler, William, LCDR, DoD OGC
Sent: Monday, June 09, 2008 10:52 AM
To: [redacted]
Cc: [redacted]
Subject: U.S. v. Khadr - Request for Additional Judicial Disclosures

Sir,

1. The defense is in receipt of COL Kohlmann's e-mail of 2 Jun 08 commenting on COL Brownback's replacement as military judge in the case of U.S. v. Khadr, as well as COL Brownback's e-mail of 8 Jun 08, attaching his "statement."

2. The defense notes that both COL Kohlmann and COL Brownback have elected to disclose the contents of communications between members of the Military Commissions Trial Judiciary (MCTJ) relating to (1) COL Brownback's status with respect to his recall to active duty and matters relating thereto, and (2) COL Brownback's conduct as military judge presiding over U.S. v. Khadr more generally (e.g., "In December 2007, COL Kohlmann and I discussed the progress in Khadr. We both wanted to insure that the case would be successfully concluded.")

3. On 3 Jun 08, the defense served the attached supplemental discovery request on the prosecution, requesting production of various materials in connection with this matter. The prosecution has not yet responded. The defense wishes to draw the attention of the attention of all parties to paragraph 3 of the request and specifically requests members of the MCTJ staff to preserve all evidence potentially responsive to the supplemental discovery request.

4. In light of COL Brownback's e-mail of 8 Jun 08, the defense respectfully requests COL Kohlmann to make or cause to be made the following additional judicial disclosures:

a. Disclosure of all previous drafts of the "statement" referenced in paragraph 1 hereof, whether in the text of e-mails, MS Word documents, or whatever other form;

b. Disclosure of the fact and contents of any communications between COL Kohlmann (and/or other MCTJ staff) and any representative or employee of the Department of Defense relating to COL Brownback's statement or the e-mail from defense counsel which prompted it, including, without limitation, any communications between COL Kohlmann and the Office of Military Commissions or DoD Public Affairs Personnel on Sunday, 8 Jun 08;

c. Disclosure of the fact and contents of any communications between COL Kohlmann (and/or other MCTJ staff) and COL Brownback relating to Col Brownback's statement or the e-mail from defense counsel which prompted it.

V/R

LCDR Kuebler

Attachment C

MiamiHerald.com

Posted on Mon, Jun. 02, 2008

Marine colonel defends dismissal of war court judge

By CAROL ROSENBERG

In an extraordinary defense of a military commissions decision, the chief of the Guantánamo court on Monday blamed Army bureaucracy for the need to replace a judge at the trial of Canadian captive Omar Khadr -- not pressure to proceed by Pentagon prosecutors.

But, Marine Col. Ralph Kohlmann added that, contrary to an earlier Defense Department announcement, Army Col. Peter E. Brownback III did not voluntarily retire from active-duty status and had sought to see the trial to completion.

Khadr, now 21, is accused of the July 2002 grenade killing of a U.S. soldier in Afghanistan. He was 15. Brownback, a 30-year veteran of the U.S. Army, was the longest serving commissions judge, until he was relieved last week.

Kohlman's abrupt replacement of the judge without explanation stirred controversy at a time when defense lawyers are accusing the Pentagon of rushing cases to trial at the height of the presidential campaign season.

Brownback has emerged as a maverick at the remote war court in southeast Cuba. Last year, he dismissed the murder and terror charges against Khadr on a technicality, only to see an appeals panel reinstate them.

Recently, he threatened to suspend the Khadr trial, effectively refusing to seat a jury of military officers, over the prison camp's refusal to release some of Khadr's detention records.

Defense lawyers last week notified the media that there was a new trial judge, Army Col. Patrick Parrish, in a skeptical statement. It noted that Brownback had complained in open court that he had been "badgered and beaten and bruised" by the trial prosecutor, Marine Maj. Jeffrey Groharing, to set a court date, even before all discovery evidence was complete.

Monday, Kohlmann said that he chose to replace Brownback before pre-trial arguments on what evidence could be brought to trial because the Army had independently elected not to extend Brownback beyond a June 29 retirement date for ``manpower management considerations unrelated to the Military Commissions process."

He did not elaborate, and commissions' spokesmen did not respond to a question on what "manpower management considerations" might mean.

Notably, however, Kohlmann's 704-word statement swatted aside suggestions that Brownback's rulings had become an obstacle to a speedy trial.

"Any suggestion that my detailing of another military judge was driven by or prompted by any decisions or rulings made by Colonel Brownback is incorrect," the Marine colonel wrote. ``Any

Attachment D

suggestion that Colonel Brownback asked to return to retired status before the case of U.S. v Khadr was completed was also incorrect."

Kohlmann also noted that he was providing the unusual explanation of the inner workings to the still evolving war court because it ``has generated discussion about the independence of the judiciary."

He also appeared to contradict a 72-word statement issued by a press officer with the Defense Department's Military Commissions unit, after the close of business on Friday, that Brownback's return to retirement in the midst of the Khadr case was ``a mutual decision between Col. Brownback and the Army."

Khadr's Pentagon defense attorney, Navy Lt. Cmdr. William Kuebler, slammed the explanation as inadequate.

'That `manpower management considerations' would have caused the Pentagon to retire Brownback in the middle of one of the most high-profile military commissions cases to date is odd to say the least," Kuebler said.

The statement was particularly extraordinary not only for its length, but because it comes just days before the Pentagon airlifts dozens of U.S. and international media to Guantánamo, to see the arraignment of five alleged co-conspirators in the Sept. 11, 2001 attacks.

As chief military commissions judge, Kohlmann has assigned himself to preside at the trial. The Pentagon prosecutor proposes to seat the U.S. military jury on Sept. 15, ensuring the complex conspiracy case involving classified information be held at the height of the presidential campaign season.

Defense lawyers had unsuccessfully sought to delay Thursday's arraignment -- the first-ever appearances of the five men who had been held for years in secret CIA and military custody.

They argued that Top Secret work space was still under construction and the accused had only recently begun meeting with Pentagon appointed defense counsel.

Moreover, two military defense attorneys have yet to get security clearances to meet their clients, as have several civilian attorneys provided as death penalty defense experts by the American Civil Liberties Union.

Kohlmann declined the delay, saying a swift arraignment was in the ``interests of justice in this case."

Logistic and legal issues will be addressed later, he said.

Attachment D

Los Angeles Times

March 27, 2007 Tuesday
Home Edition

SECTION: MAIN NEWS; National Desk; Part A; Pg. 1

LENGTH: 1165 words

HEADLINE: The World;
Terror suspect pleads guilty;
Australian David Hicks' admission caps a day of legal wrangling at the Guantanamo tribunal.

BYLINE: Carol J. Williams, Times Staff Writer

DATELINE: GUANTANAMO BAY, CUBA

BODY:

Australian David Hicks pleaded guilty Monday to material support of terrorism, securing a symbolic victory for the Bush administration in the first war crimes trial since World War II.

After a day of legal wrangling in which two of Hicks' three defense lawyers were barred from representing him, the 31-year-old Muslim convert and soldier of fortune told the military judge in a specially reconvened night session that he had aided a terrorist group.

Bedraggled and appearing irritated, Hicks showed little emotion at the prospect of potentially leaving Guantanamo Bay after more than five years in military detention.

Under an agreement between Washington and the Australian government, Hicks would be allowed to serve any sentence in an Australian prison.

The tribunal's presiding officer, Marine Col. Ralph H. Kohlmann, is expected to hear the details of what Hicks has admitted to this afternoon, and the 10-member military commission could gather by the end of the week to determine a sentence, said spokeswoman Maj. Beth Kubala. The tribunal is formally known as a commission.

Hicks was captured in December 2001 by Afghanistan's Northern Alliance fighters while attempting to flee the country in a taxi. He was turned over to U.S. forces and flown to Guantanamo Bay in January 2002.

He faced allegations of using a gun to guard a Taliban tank, conducting surveillance of the empty U.S. Embassy in Kabul, attending Al Qaeda training camps and fighting American forces in Afghanistan.

Although she proclaimed herself a neutral party in the Pentagon's newly reconstituted war crimes process, Kubala said Monday's proceedings demonstrated that "this is a process that is transparent, legitimate and moving forward."

Hicks was the first detainee to be prosecuted among the nearly 800 men who have been brought here as so-called enemy combatants since January 2002, and the only one charged formally with a war crime. He also was one of 10 suspects charged under tribunals enacted by President Bush in November 2001 that were deemed unconstitutional by the Supreme Court nine months ago. About 385 detainees remain in the Guantanamo Bay prison.

Under the evolving rules of the Military Commissions Act passed by Congress in September, the defense and prosecution can cut a plea bargain, as in a civilian court, and recommend a negotiated sentence to the tribunal members, who act as judge and jury in meting out punishment.

Hicks changed his mind about entering a plea after more than four hours of pretrial procedures in which his main defense lawyer, Marine Maj. Michael Mori, was unable to persuade Kohlmann that he needed more time to prepare.

Mori was left alone at the defense table with the defendant when civilian criminal defense lawyer Joshua Dratel was barred from participating because he refused to promise to adhere to procedural rules that had yet to be defined.

"I can't sign a document that provides a blank check on my ethical obligations," Dratel told Kohlmann, saying his obligation was to his client, not to the military process. "You can't make it an all-or-nothing proposition. I can't buy a pig in a poke."

Kohlmann also declined to approve a second civilian lawyer, Rebecca Snyder, on the grounds that commission rules allowed civilians only if their representation incurred no expense to the U.S. government. Snyder is a Pentagon employee.

Legal analysts were critical of the opening day of the reconstituted war crimes tribunal.

"These trials are the United States' chance to restore its moral authority and reputation as a leading proponent of the rule of law. Instead, today's antics highlighted the illegitimacy of a hastily crafted process without established precedent or established rules," said Jennifer Daskal, a lawyer observing the commissions for Human Rights Watch. "It appears that Mr. Hicks was strong-armed into pleading guilty after two of his counsel were thrown off the case."

Kohlmann had adjourned the arraignment hearing, in which Hicks chose to put off entering a plea until other preliminary matters were decided. But the presiding officer called the tribunal back to order at 8:25 p.m., and Hicks pleaded guilty to the part of the charge accusing him of supporting a terrorist organization, though he denied committing any specific violent act.

The split plea was probably negotiated with the government to justify a lighter sentence than the 20-year term the chief prosecutor had hinted would be in order if Hicks were tried and found guilty. The charge can carry a life term, but the prosecutor, Air Force Col. Morris Davis, had said Sunday that he doubted a conviction would warrant the maximum sentence.

Davis said the prosecution would take into consideration that Hicks' plea spared the government weeks of testimony and presentation of evidence.

Hicks, dressed in tan prison garb, stunned his family and court spectators with his initial appearance: He was scruffy, wore his hair halfway down his back and had gained at least 30 pounds since he was last seen at a Guantanamo Bay proceeding in November 2004.

Terry Hicks, the defendant's father, said his son told him during an emotional morning reunion in a court anteroom that he didn't trust the U.S. military forum to live up to a pledge by the Bush administration to transfer Hicks to Australian custody at the end of the proceedings.

"Will they allow him to go home?" Terry Hicks asked with skepticism. "They've held him for five years. Who would you trust who held you for five years!"

In Australia, Foreign Minister Alexander Downer told the Associated Press today that the government expected Hicks to be returned to Australia soon under the agreement with Washington.

Terry Hicks and the defendant's sister, Stephanie, were boarding a State Department plane for a trip back to Washington when tribunal officials learned of the decision to enter a plea. The two were given an opportunity to return to the courtroom across Guantanamo Bay from the airstrip but declined, a senior military official here confirmed on the condition that he not be identified.

Kohlmann asked Hicks whether his exclusion of Dratel and Snyder had influenced his decision to plead guilty. Hicks said it had not. Lawyers were prohibited by tribunal authorities to discuss more about the plea deal than was revealed in court.

Hicks' protracted stay in U.S. custody -- he was among the first Guantanamo Bay prisoners to arrive -- has become an issue in Australia, where Prime Minister John Howard's Liberal Party faces a tough reelection campaign this year.

"There's no reason for this to happen except that political considerations are driving the schedule," said Ben Wizner, a lawyer for the American Civil Liberties Union. "Every time, these proceedings reveal themselves to be political and not legal."

The Pentagon set a 30-day deadline for arraigning Hicks when it charged him March 1, just after Vice President Dick Cheney visited Australia and was urged by Howard to dispense with further delays.

*

carol.williams@latimes.com

GRAPHIC: PHOTO: DAVID HICKS The detainee, in an undated photo, denies that he committed any specific violent act. PHOTOGRAPHER: European Pressphoto Agency

LOAD-DATE: March 27, 2007

UNITED STATES OF AMERICA v. OMAR AHMED KHADR a/k/a "Akhbar Farhad" a/k/a "Akhbar Farnad" a/k/a "Ahmed Muhammed Khali"	**D-067** **GOVERNMENT'S RESPONSE** **To the Defense's Motion to Dismiss for Lack of Judicial Independence** 25 July 2008

1. Timeliness: This motion is filed within the timelines established by the Military Commissions Trial Judiciary Rule of Court 3(6)(b) and the Military Judge's scheduling order of 19 June 2008.

2. Relief Requested: The Government respectfully requests that the Defense's motion to dismiss for lack of judicial independence be denied in full.

3. Overview: The Defense motion is completely baseless and should be denied. The accused does not enjoy the individual rights protections of the Constitution. In any event, the statutory and regulatory provisions governing Military Commissions provide sufficient safeguards against interference with judicial impartiality and due process for the accused. Any suggestion that there has been interference with the judiciary is without merit.

4. Burden of Persuasion: As the moving party, the defense bears the burden of establishing any factual issues necessary to resolve the motion by a preponderance of the evidence. R.M.C. 905(c)(2)(A).

5. Facts: The facts necessary to deny this motion are contained in the discussion below.

6. Discussion:

a. An alien enemy combatant, such as the accused, who has been charged under the MCA, does not enjoy the individual rights protections of the Constitution.

i. The accused argues that a panoply of constitutional safeguards are now applicable to him after the Supreme Court's decision in *Boumediene v. Bush*, 128 S. Ct. 2229 (2008). This analysis of the Court's decision is incorrect.

ii. In *Boumediene*, the Supreme Court addressed a narrow question – whether the Suspension Clause of the Constitution, art. I, § 9, cl. 2, applies to alien enemy combatants detained at Guantanamo Bay, who are being held based solely upon the determination of a Combatant Status Review Tribunal. The Court concluded that

uncharged enemy combatants at Guantanamo Bay must, after some period of time, be afforded the right to challenge their detention through habeas corpus. In reaching that conclusion, the Court considered both the historical reaches of the writ of habeas corpus, *see id.* at 2244-51, and the "adequacy of the process" that the petitioners had received. The Court signaled no intention of extending the individual rights protections of the Constitution to alien enemy combatants tried by military commission.

iii. To the contrary, the Court emphasized that "[i]t bears repeating that our opinion does not address the content of the law that governs petitioners' detention." *Boumediene*, 128 S. Ct. at 2240; *see also id.* at 2277. The Court emphasized that the petitioners in that case had been held for over six years without ever receiving a hearing before a judge, *see id.* at 2275, and the Court specifically contrasted the circumstances of the petitioners with the enemy combatants in *Quirin* and *Yamashita* who had received a trial before a military commission (albeit under procedures far more circumscribed than those applying here). The Court noted that it would be entirely appropriate for "habeas corpus review...to be more circumscribed" – if the court were in the posture of reviewing, not the detention of uncharged enemy combatants, but those who had held a hearing before a judgment of a military commission "involving enemy aliens for war crimes." *See id.* at 2270-71.

iv. *Boumediene* thus was a decision concerning the separation of powers under the Constitution and the role that the courts may play, under the unique circumstances of the detentions at Guantanamo Bay, in providing for the judicial review of the detention of individuals who had not received any adversarial hearing before a court or military commission. *See Boumediene*, 128 S. Ct. at 2259 ("[T]he writ of habeas corpus is itself an indispensible mechanism for monitoring the separation of powers."). In considering whether the Suspension Clause would apply, *Boumediene* articulated a multi-factored test of which the first factor required consideration of "the detainees' citizenship and status and the adequacy of the process through which status was determined." *See id.* at 2237. In this case, there is no dispute that Khadr is an alien, and he is being tried before a military commission established by an Act of Congress and with the panoply of rights secured by the MCA. Khadr's status as an alien unlawful enemy combatant has not been challenged by the accused. *See U.S. v. Khadr*, Transcript of RMC 803 Session, 8 November 2007, at 81 ("Transcript"). According to the Commission, personal jurisdiction over the accused exists, meaning the accused is considered an alien unlawful enemy combatant until that status is challenged. *Id.* at 90; *see also U.S. v. Khadr*, USCMCR 07-001 (Sept. 24, 2007) ("We find that this facial compliance by the Government with all the pre-referral criteria contained in the Rules for Military Commissions, combined with an unambiguous allegation in the pleadings that Mr. Khadr is "a person subject to trial by military commission as an alien unlawful enemy combatant," entitled the military commission to initially and properly exercise *prima facie* personal jurisdiction over the accused."). *Id.* at 21. Moreover, the accused will have the opportunity to challenge his status – once he raises the issue – at a trial. Thus, *Boumediene* does not even provide the accused with any rights under the Suspension Clause. It goes without saying that he may not lay claim to any of the other individual rights secured by the Constitution.

v. Indeed, even if the accused could claim an entitlement under *Boumediene* to rights under the Suspension Clause, the Supreme Court's decision did not, in any terms, upset the well-established holding, recognized previously by the Commission, that the Fifth Amendment and other individual rights principles of the Constitution do not apply to alien enemy combatants lacking any voluntary connection to the United States. *See U.S. v. Khadr*, D-014, Ruling on Defense Motion to Dismiss for Lack of Jurisdiction (Equal Protection), at 2, para. 7-8 ("[M]ilitary commissions are not subject to the requirements of the Fifth Amendment."). The Supreme Court has recognized that the writ of habeas corpus historically has had an "extraordinary territorial ambit." *See Rasul v. Bush*, 542 U.S. 466, 482 n. 12 (2004). By contrast, the Court has made clear – in precedents that *Boumediene* did not question – that the individual rights provisions of the Constitution run only to aliens with a substantial connection to our country and not to alien enemy combatants detained abroad. *See United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990); *see also Johnson v. Eisentrager*, 339 U.S. 763 (1950) (finding "no authority whatever for holding that the Fifth Amendment confers rights upon all persons, whatever their nationality, wherever they are located and whatever their offenses").

vi. Even when an alien is found within United States territory (as was the nonresident alien in *Verdugo-Urquidez*) the degree to which constitutional protections apply depends on whether the alien has developed substantial voluntary contacts with the United States. *Id.* at 271. The accused's contacts with the United States, which consist of unlawfully killing a U.S. Soldier in the course of unlawfully waging war against the nation and being detained at a U.S. military base, "is not the sort to indicate any substantial connection with our country." *Id.*; *see Eisentrager*, 339 U.S. at 783 (finding "no authority whatever for holding that the Fifth Amendment confers rights upon all persons, whatever their nationality, wherever they are located and whatever their offenses"). As the *Eisentrager* Court explained, "[i]f [the Fifth] Amendment invests enemy aliens in unlawful hostile action against us with immunity from military trial, it puts them in a more protected position than our own soldiers" because "American citizens conscripted into the military service are thereby stripped of their Fifth Amendment rights and as members of the military establishment are subject to discipline, including military trials for offenses against aliens or Americans." *Id.*

vii. *Boumediene*'s holding was premised on the unique role of habeas corpus in policing the separation of powers in our constitutional system, *see Boumediene*, 128 S. Ct. at 2259, and on a factual difference between *Eisentrager*'s petitioners and those in *Boumediene*: the former did not contest their status as enemy combatants; the latter did so contest their status and thus required a remedy in habeas. *See id.* Nothing in *Boumediene*, however, casts doubt on *Eisentrager*'s well-established (and subsequently applied) denial that the Constitution applies in toto to nonreseident aliens. *Boumediene* certainly does not extend the Constitution's individual-rights protections, contrary to *Eisentrager*, *Verdugo-Urquidez* and other cases, to alien unlawful enemy combatants before congressionally-constituted military commissions. To paraphrase the *Boumediene* Court itself, "if the [petitioner's] reading of [*Boumediene*] were correct, the opinion would have marked not only a change in, but a complete repudiation of" long-standing precedent. *Id.* at 2258. Because the Supreme Court did not disturb those holdings in *Boumediene*, they remain binding precedent before this Commission. As the Court

explained in *Agostini v. Felton*, 521 U.S. 203 (1997), "if a precedent of this Court has direct application in a case, yet appears to rest on reason rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Id.* at 237-38 (quotation omitted). Thus, the recognition that *Boumediene* did not overrule those cases is sufficient in and of itself to deny the accused's requested relief.

viii. Contrary to *Agostini*, the accused would read *Boumediene* as, *sub silentio*, overruling the Court's existing precedents and providing a two-part test – found nowhere in *Boumediene* – for the analysis of other constitutional rights. It is clear, however, that the test enunciated by the Court to determine whether the Suspension Clause applied to the *Boumediene*-petitioners was specifically geared to measuring whether the Suspension Clause – and not any other constitutional provision – applies to those petitioners. *See id.* at 2237. That three-part test was clearly intended by the Court only to resolve the limited and narrow issue before it, and is therefore inapposite to the question of whether other portions of the Constitution apply to alien detainees at Guantanamo.

ix. Even so, under that functional analysis endorsed in *Boumediene* for purposes of the Suspension Clause, it is clear that enemy aliens abroad do not come within the protection of the Fifth Amendment. The Government has broad latitude when it operates in the international sphere, where the need to protect the national security and conduct our foreign relations is paramount. *See Haig v. Agee*, 454 U.S. 280, 292, 307-308 (1981); *see also Palestine Information Office v. Schultz*, 853 F.2d 932, 937 (D.C. Cir. 1988) (holding that, in applying constitutional scrutiny to challenged Executive action within the United States, court must give particular deference to political branches' evaluation of our interests in the realm of foreign relation and selection of means to further those interests). In the international arena, distinctions based on alienage are commonplace in the conduct of foreign affairs. *See, e.g., DKT Memorial Fund, Inc. v. Agency for International Development*, 887 F.2d 275, 290-291 (D.C. Cir. 1989) (recognizing that the government speaks in the international sphere "not only with its words and its funds, but also with its associations"). Drawing a distinction between aliens abroad, on the one hand, and those who make up part of our political community, on the other hand, is a basic feature of sovereignty. *See Cabell v. Chavez-Salido*, 454 U.S. 432, 439 (1982); *Foley v. Connelie*, 435 U.S. 291 (1978); *cf. Mathews v. Diaz*, 426 U.S. 67, 80, 85 (1976) (recognizing that it is "a routine and normally legitimate part" of the business of the Federal Government to classify on the basis of alien status and to "take into account the character of the relationship between the alien and this country"). In this context, application of the Fifth Amendment to limit the political branches' treatment of aliens abroad would improperly interfere with those branches' implementation of our foreign policy and their ability to successfully prosecute a foreign war.

b. The statutory and regulatory provisions governing Military Commissions provide sufficient safeguards against interference with judicial impartiality and due process for the accused.

i. Although the accused does not enjoy constitutional due process protections, the statutory and regulatory framework governing military commissions provide ample protections against interference with judicial impartiality.

ii. The MCA prohibits any unlawful influence over military commission proceedings, including the independent decision making of the military judges. MCA § 949b(a)(1) provides:

> No authority convening a military commission under this chapter may censure, reprimand, or admonish the military commission, or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the military commission, or with respect to any other exercises of its or his functions in the conduct of the proceedings.

iii. In addition, and contrary to the accused's concerns about the role of the Convening Authority:

> ...The convening authority of a military commission under this chapter shall not prepare or review any report concerning the effectiveness, fitness, or efficiency of a military judge detailed to the military commission which relates to his performance of duty as a military judge on the military commission.

10 U.S.C. § 948j(f). This includes, presumably, the evaluation report of the Chief Judge, over whom the Defense whimsically implies the convening authority exerts a level of undue and politically motivated influence over – without offering a shred of evidence to support this inference. *See* Def. Mot. at 3.

iv. The accused may also challenge the independence of the military judge. In § 949f(a), the MCA provides that "[t]he military judge...of a military commission under this chapter may be challenged by the accused or trial counsel for cause stated to the commission." The corresponding rule is RMC 902, which allows for questioning of the military judge as well as the presentation of evidence concerning potential bias. The accused has made full use of these provisions.

v. Prior to the 8 November 2007 hearing in *U.S. v. Khadr*, the accused submitted written voir dire questions to the military judge. *See* Transcript at 33-34. At the 8 November 2007 hearing in *U.S. v. Khadr*, the Defense conducted a lengthy voir dire examination of the military judge. *Id.* at 33-68. Following a short recess, the Defense challenged the military judge for cause, which the military judge denied. *Id.* at 69-77.

vi. After the Military Judge denied the Defense request, Colonel Brownback presided over this military commission until he was removed from the case because of the Army's decision not to extend Colonel Brownback's orders for a fifth year.

vii. After Colonel Parrish was assigned to the case in response to Colonel Brownback's return to retirement the Defense submitted written voir dire questions to the Military Judge. See Attachment A. On 1 July 2008, the Military Judge sent his written response. See Attachment B.

viii. In spite of the ample protections afforded the accused in the MCA and the MMC, the accused maintains that there is a lack of judicial independence in the military commissions. In support of this proposition the accused cites *Weiss v. United States*, 510 U.S. 163 (1994). Rather than strike down the military practice of untenured judges as an unconstitutional denial of the petitioners due process rights, the Court in *Weiss* stated, "We believe the applicable provisions of the UCMJ, and corresponding regulations, by insulating military judges from the effects of command influence, sufficiently preserve judicial impartiality so as to satisfy the Due Process Clause." *Id.* at 179.

ix. The protections that the Court in *Weiss* found sufficient to preserve judicial impartiality are strikingly similar to the protections in military commissions. For example, the Court stated that judicial independence was enhanced by placing military judges outside of the authority of the convening authority, and by prohibiting the convening authority from preparing the fitness report of the military judge relating to his judicial duties. *Weiss*, 510 U.S. at 180; *compare* 10 U.S.C. § 948j(f), *supra*. Also, the Court noted the ability of the accused to challenge the court-martial judge for cause. *Weiss*, 510 U.S. at 180; *compare* 10 U.S.C. § 949f(a), *supra*. Finally, the Court cited the oversight of the Court of Military Appeals for "its vigilance in checking any attempts to exert improper influence over military judges." *Weiss*, 510 U.S. at 181. Contrary to the Defense attack on the Court of Military Commission Review and United States Court of Appeals for the District of Columbia Circuit (See Defense Brief at 5), there is no better check on judicial independence than the oversight of military commissions by the Court of Military Commission Review, the United States Court of Appeals for the District of Columbia Circuit, and notably left out of the Defense motion, upon writ of certiorari, the United States Supreme Court. In the event that an accused has a legitimate challenge to a Military Judge's impartiality, which the present challenge certainly is not, the levels of oversight clearly provide ample review to ensure impartiality and fairness in Military Commission proceedings.

x. Although the protections in the MCA resemble those of the UCMJ, the accused argues that nearly any deviation from court-martial practice is unlawful.[1] *See* Def. Mot. at 4, para. 5(a)(6)(i). This interpretation is inconsistent with the plain meaning of the language of the MCA. To properly quote the statutory guidelines for implementing rules of procedure and evidence:

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[1] In the Defense's continued scorched-earth policy of attacking all participants and organizations involved in the military commission process, the Defense, with no factual support, attacks the Secretary of Defense and drafters of the Manual for Military Commissions, suggesting "[o]ther than a desire to secure an advantage for the government in litigation, there is no military (or other) necessity that would justify departure from such a practice in military commissions."

> Such procedures shall, so far as the Secretary considers practicable or consistent with military or intelligence activities, apply the principles of law and the rules of evidence in trial by general courts-martial. Such procedures and rules of evidence may not be contrary to or inconsistent with this chapter.

10 U.S.C. § 949a(a). To make it abundantly clear that the military commissions are not bound by the UCMJ, Congress included the following language:

> [The UCMJ] does not, by its terms, apply to trial by military commission, except as specifically provided in [the MCA]. The judicial construction and application of [the UCMJ] are not binding on military commissions established under [the MCA].

10 U.S.C. § 948b(c). As written, the protections against interference with judicial independence provide the accused with robust due procedural protections.

c. The only damage done to the perception of fairness to the military commission is through continued baseless accusations by the Defense.

i. In order to discredit the military commission process, the defense continues its routine, baseless attacks upon the participants. In this so-called "highly-charged political environment," Def. Mot. at 4, the accused implies that the Chief Trial Judge, who is "hand-picked" by the Convening Authority, who is "hand-picked by the Secretary of Defense, is unable to conduct his judicial function ethically. Def. Mot. at 3. Due to the Chief Trial Judge's alleged "dependency" on the Convening Authority, he "could be influenced...to advance the government's interests in certain matters." Id. at 3. According to the accused, these matters include:

> COL Kohlmann's decision to proceed in the case of *United States v. Hicks* in March 2007 before the regulatory framework for the military commission process had even been established...or his decision to defend the military commissions against public criticism following COL Brownback's termination by effectively issuing a press release and then refusing to answer further questions about the circumstances of COL Brownback's departure.

See Def. Mot. at 3-4 (footnotes omitted).

ii. The Defense claims of Colonel Kohlmann's dependency are misplaced. The Chief Judge is a military officer assigned to work on Military Commission cases as well as preside over courts-martial. He is not dependent on the Convening Authority in any regard. The Defense citation to *Tumey v. Ohio* provides little support for their position. In *Tumey*, as the Defense recognizes, the Supreme Court struck down a system that allowed mayors to try cases that would result in fines distributed to their individual villages. Unlike *Tumey*, there is simply no evidence of the Chief Judge being interested in the outcome of any particular case. Defense suggestions otherwise are unavailing.

iii. The Defense also targets the Convening Authority in their motion, but provides no supporting documentation. The Defense motion states, "The Convening Authority is therefore much more like a *de facto* chief prosecutor with a direct, institutional and personal interest in the validation of the military commission process and in the outcomes of military commission cases – ***a conclusion bolstered by evidence of the actions of the Convening Authority's Legal Advisor in recent months***." Def. Mot. at 3. The footnote following this sentence reads: "*See* matters submitted in support of anticipated defense motion to dismiss based on unlawful influence, which will be filed with the Military Commission no later than 15 July 2008." Def. Mot. at 3 n.2.[2]

iv. Notably, the "public criticism" in the instant case the Defense now seeks to gain advantage from was originated by the Defense in their continued attempts to attack the military commission process in the media in order to secure a political resolution of this case. On 29 May 2008, the Defense attempted to influence the "reasonable outside observer," issuing the following press release (in bold):

From: Kuebler, William, LCDR, DoD OGC
[redacted]
To: Kuebler, William, LCDR, DoD OGC
[redacted]
Sent: Thu May 29 18:01:57 2008
Subject: Khadr -- Press Advisory -- 29 May 2008 -- Judge dismissed

KHADR JUDGE RELIEVED AFTER THREATENING SUSPENSION OF MILITARY COMMISSION PROCEEDINGS

Colonel Peter Brownback, the military judge presiding over the Guantanamo Bay trial of Canadian citizen, Omar Khadr, has been relieved of further duties in the case. In a brief e-mail message released late this afternoon, military commissions chief judge, Colonel Ralph Kohlmann, announced that Brownback is to be replaced by Colonel Patrick Parrish.

The change comes in the wake of a Guantanamo Bay military commission hearing in which Brownback threatened to suspend proceedings in the case of Omar Khadr if prosecutors continued to withhold key evidence from Omar's lawyers, and in which he noted that he had been "badgered and beaten and bruised by Major Groharing since the 7th of November, to set a trial date" in the case. Despite superficial consideration of key legal issues such as whether military commissions can lawfully prosecute a former child soldier, Brownback had rejected extreme

[2] As of the filing of this response, there have been no "matters submitted" to "bolster" these crude allegations. Contrary to the Military Judge's 19 June 2008 Scheduling Order, the Defense filing suggests the Defense is operating under the assumption that they are free to file motions at any time, regardless of scheduling orders put in place by the Military Judge. Absent some compelling reason why the Defense failed to meet the established deadlines, future motions should be rejected as untimely.

prosecution arguments on several disclosure issues and directed prosecutors to provide Omar's lawyers with evidence critical to his defense. As recently as yesterday, prosecutors continued to harass Brownback, stating in an e-mail that Brownback should reject a series of defense requests for disclosure and set a trial date. Apparently rejecting Groharing's charge of undue delay, Brownback accepted the motions and required prosecutors to respond. His termination followed, today.

The text of Col. Kohlmann's and Major Groharing's e-mails are provided below --

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LTC [redacted]

1. Colonel Patrick Parrish, USA, is hereby detailed as Military Judge in the case of U.S. v. Khadr.

2. Please advise the appropriate persons regarding this change.

V/R,

Ralph H. Kohlmann
Colonel, U.S. Marine Corps
Chief Judge, MCTJ

****
******
Ms. [redacted]
Please pass to Colonel Brownback.
1. In the past week the Defense has filed five additional motions to compel discovery. The motions filed by the Defense have not been assigned filing designations.

2. In the Military Judge's ruling on D-056, he noted that the commission would consider the timeliness of these additional motions in due course.

3. With the exception of the Defense Motion to Compel Production of ICRC Documents, each of the Defense motions is based on a discovery request filed during May 2008, over a year after this case was referred for trial and over seven months after the Court of Military Commission Review decision. The Motion to Compel ICRC Documents is based on a 3 March 2008 discovery request. The Defense has provided little, if any, explanation regarding the delay in making these requests.

4. The subject discovery motions could have, and should have, been filed many months ago. It is time

for this case to proceed to trial. The Prosecution has provided all discovery required by the Military Commissions Act and Manual for Military Commissions. Absent compelling justification for submitting additional discovery requests or motions to compel discovery, the Military Judge should reject the Defense filings as untimely.

V/R,
Jeff Groharing
Major, U.S. Marine Corps
Prosecutor, Office of Military Commissions

iv. The Defense, perhaps recognizing that the suggestions of improper conduct made in the conspiracy theory it concocted to explain Colonel Brownback's removal were completely baseless, now attempts to distance themselves from actually making these thinly veiled ethical allegations, referring now to the perspective of "[a] reasonable outside observer," avoiding taking responsibility for libeling professional Judge Advocates. See Defense Mot. at 3.

v. Finally, it is significant to note that Military Judges (and counsel) take an oath of office to support and defend the Constitution of the United States, a fact Colonel Brownback reminded the Defense of during voir dire. ("I refer Commander Kuebler to the oath of office for commissioned officers.") *See* Transcript at 76. There is simply no evidence that Colonel Brownback failed to take that oath seriously in the discharge of his duties or that any other participant in the military commission process has attempted to unlawfully influence either of the Military Judges detailed to this case. The motion to dismiss should be denied.

7. Oral Argument: This motion is completely baseless and should be denied without oral argument. To the extent, however, that the Military Judge orders the parties to present oral argument, the Government will be prepared to do so.

8. Witnesses and Evidence: All of the evidence and testimony necessary to deny this motion is already in the record.

9. Certificate of Conference: Not applicable.

10. Additional Information: None.

11. Submitted by:

Jeffrey D. Groharing
Major, U.S. Marine Corps
Prosecutor

UNITED STATES OF AMERICA	)	**RULING**
	)	
	)	**Defense Motion**
v.	)	**To Dismiss**
	)	**D067**
	)	
OMAR AHMED KHADR	)	(Lack of Judicial Independence)
a/k/a "Akhbar Farhad"	)	
a/k/a "Akhbar Farnad"	)	
a/k/a "Ahmed Muhammed Khali"	)	

1. The Defense requests the Commission to dismiss all charges and specifications because this Military Commission is unlawfully constituted and lacks jurisdiction to hear this case.

2. The Military Commissions Act (MCA) in §948j provides that "a military judge shall be detailed to each military commission under this chapter. The Secretary of Defense shall prescribe regulations providing for the manner in which military judges are so detailed to military commissions." Pursuant to this statutory authority the Secretary of Defense issued the Manual for Military Commissions (MMC) prescribing rules for the military commission (RMC).

a. The Secretary of Defense, pursuant to that authority, authorized the Convening Authority to select a Chief Trial Judge for the Military Commissions. The Convening Authority selects the Chief Trial Judge from the pool of military judges each Service Judge Advocate General makes available for serving on a commission. The Chief Trial Judge is responsible for detailing a military judge for each military commission. See RMC 503(b)(1) and (2).

b. Congress provides protection for the independence of military judges by precluding the Convening Authority from reprimanding or otherwise taking adverse action against a military judge with respect to the military judge's performance of duties in the military commissions. See MCA §949b(a)(1). The Convening Authority is also precluded from preparing or reviewing any evaluation or fitness report on any military judge concerning his or here performance of duty as a military judge on the military commission. See MCA §948j(f).

3. The military judges in this commission were lawfully detailed by the Chief Trial Judge for the Military Commissions. It is clear that Congress made provisions for the independence of the military judges. There is no evidence before this commission which

shows that either of the military judges in this case had his independence impeded in any way. It is also clear that military judges have made decisions in this case and other commission cases showing their impartiality.

4. Accordingly, the motion to dismiss all charges and specifications is denied.

So Ordered this 15th day of August 2008.

Patrick J. Parrish
COL, JA
Military Judge